IN THE

Supreme Court of the United States

October Term, 1944

No. 122

CLIFTON MALONEY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF ANNIE W. CHIEVES, DECEASED, ET AL.,

Petitioners,

against

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF PHILADELPHIA, A CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Preliminary Statement

This brief is submitted by respondent, Board of Directors of City Trusts of the City of Philadelphia, in opposition to the petition of Clifton Maloney, executor under the will of Annie W. Chieves, and Hubert A. Spangler, executor and trustee under the will of Mary E. Graff, for a writ of certiorari to the Court of Appeals for the District of Columbia. The judgment of the Court of Appeals, of which petitioners seek a review, reversed a judgment of the District Court in their favor. The proceeding in the District Court was brought by the executor of the estate of Inez Walsh Fulton for a construction of the Fulton will, and the parties here were defendants in that proceeding.

The sole question presented here is one of local common law, to wit, whether the Fulton will by its terms gave the sisters of testatrix, whose estates are here represented by petitioners, absolute bequests or merely life estates with remainder to respondent. The Court of Appeals held that the sisters were given life estates only and that respondent was entitled to the remainder.

The Opinions Below

The opinion of the District Court has not been officially reported (R. 31-33). The opinion of the Court of Appeals has been reported at 141 F. (2d) 275 (R. 37-39).

Statement of the Case

Inez Walsh Fulton died a resident of the District of Columbia on June 12, 1939 (R. 4) leaving a will dated July 3, 1933 (R. 4) and a codicil thereto dated May 11, 1936 (R. 4), both of which are holographic.

Her will provided: "To my sisters Mary E. Graff * * * and Annie W. Chieves * * * I bequeath, unconditionally, all that I own and possess, asking them to make the following gifts," naming three charities: St. Matthew's Church, the Grenfell Mission, and the Washington Home for Incurables, in the amounts of $500, $250, and $100, respectively (R. 9-10). She then provided for the cremation of her body, the burial of the ashes, the erection of a headstone, an inexpensive casket, and a simple funeral service. After directing that her sister Mary E. Graff was to be appointed executrix without bond and her sister Annie W. Chieves, substitute executrix without bond, the testatrix proceeded:

> "After the death of Mary E. Graff and Annie W. Chieves the estate is to be placed in the City Trust of Philadelphia, Pa., which has charge of the funds of Girard College;—to purchase a scholarship in the medical school, Jefferson College, for a Protestant graduate of Girard College * * *,"

and in detail described the type of scholarship which she desired to have established (R. 10, 11). This portion of the will, which is by far the largest part, concluded with the words: "The Scholarship is to be called 'The Inez Walsh Fulton Scholarship'" (R. 11). The only change made by the codicil was to revoke the executor clause of the will and direct that the American Security and Trust Company be appointed executor (R. 11).

When Inez Walsh Fulton died, she was 72 years of age. Her only surviving relatives were the two sisters named in the will. Mary E. Graff, one of the sisters, who died on July 14, 1939, a little more than a month after the death

of Inez Walsh Fulton, was at the time of her death 81 years of age (R. 5). She left a will dated June 26, 1939, which was admitted to probate by the Probate Court of the City of Philadelphia, and letters testamentary were issued thereunder to the petitioner Hubert A. Spangler (R. 5). Her estate, which was valued at approximately $48,000, was left principally to friends. She left nothing to the respondent (R. 12-15).

The other sister, Annie W. Chieves, died in May, 1941, at the age of 81 (R. 15). Her will was admitted to probate in the District Court of the United States for the District of Columbia, and letters testamentary were issued to the petitioner Clifton Maloney (R. 15). She left her entire estate, which was valued at approximately $50,000, to numerous charitable organizations and institutions. She left nothing to the respondent.

The Question Presented

Of the four reasons for granting the writ urged by petitioners (Pet. 6-7), not one has any foundation whatsoever. The sole question actually presented by the Petition is the same question which was passed upon by the Court of Appeals, whether the will gave the sisters estates in fee or merely life estates with remainder to respondent. This is a question of the local common law of wills, properly passed upon with finality by the local appellate tribunal. It is not a question which requires or deserves review by this Court.

Summary of the Argument

POINT I: There are no special or important reasons for granting a writ of certiorari in this case.

POINT II: The decision of the Court of Appeals was correct.

CONCLUSION: The petition should be denied, with costs.

THE ARGUMENT

POINT I

There are no special or important reasons for granting a writ of certiorari in this case.

This Court has stated that it will not ordinarily review decisions of the United States Court of Appeals for the District of Columbia which declare the common law of the District.

> *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285, 56 S. Ct. 190, 80 L. Ed. 229 (1935);
> ROBERTSON AND KIRKHAM, "Jurisdiction of the Supreme Court of the United States", §331 [1936 Ed.].

Rule 38-5 of General Rules of the Supreme Court, which provides the circumstances under which this Court will exercise its discretion to review, states that certiorari may be granted:

> "(c) Where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the

> Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court."

Certainly the facts and arguments set forth in the Petition do not disclose any valid reason why this Court should exercise its discretion under Rule 38-5(c). The question is not one of general importance; it involves merely the interpretation of a slightly ambiguous will. Nor did the decision of the Court of Appeals fail to give proper effect to any decision of this Court, as we shall point out below.

POINT II

The decision of the Court of Appeals was correct.

The Court of Appeals based its decision upon the universal rule that the intent of the testatrix as evidenced by the language of the will was controlling. In analyzing the will, that court gave full effect to the detailed, lengthy provisions made by testatrix in respect to the scholarship set up by her in the last part of the will; it treated those provisions as qualifying and explaining the inept use of the word "unconditionally" in the gift to her sisters; and it concluded that to place undue emphasis on that word, as the District Court had done, was to give it a meaning which would customarily be used by legal purists.

Even a cursory examination of the language of the will sufficiently discloses the intent of testatrix. She wished her sisters to be provided for under all circumstances during their lives; and accordingly she gave them an unqualified power to invade the principal. But under no circum-

stances could it be concluded that she intended their estates to benefit. She expressed very definite plans as to the disposition of her property after their deaths by setting up this scholarship at considerable length.

Nor is there any basis for petitioners' contention that the bequest to the City Trusts is merely precatory, to be treated in the same fashion as the gifts to St. Matthew's Church, the Grenfell Mission, and the Home for Incurables. After making these obviously precatory gifts, testatrix provided for her funeral and burial, and appointed an executrix and substitute therefor. She then went into the detailed description of the scholarship. In order to hold that the scholarship provision is merely precatory, it would also be necessary to denote as precatory the funeral and burial provisions and the appointment of the executrix and substitute therefor. Such a conclusion would be outrageous to all considerations of common sense.

Petitioners rely strongly on the case of *Howard* v. *Carusi,* 109 U. S. 725, 3 S. Ct. 575, 27 L. Ed. 1089 (1884) (Pet. 8-11), as authority for their contention that the will shows an intent of testatrix to give her sisters a fee.

There the testator gave all his property to his brother "to be held, used, and enjoyed by him, his heirs, executors, administrators, and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death, the same, or so much thereof as he, the said Samuel Carusi, shall not have disposed of by devise or sale, shall descend to my three beloved nieces * * *."

The court held that the brother took a fee since he had been expressly given the absolute power of disposition by sale or devise, and thus there was nothing to which the attempted remainder could attach.

Here Mrs. Fulton did not give her sisters an express power of devise. In the *Carusi* case the most precatory words possible were used in direct connection with the power to devise. That, too, is not the situation here.

Nor are the other cases decided by this Court upon which petitioners rely remotely in point here. *Potter* v. *Couch,* 141 U. S. 296, 11 S. Ct. 1005, 35 L. Ed. 721 (1891) (Pet. 11) holds that where a fee is given, a devise over in the event of alienation or attachment is void. In *Roberts* v. *Lewis,* 153 U. S. 367, 14 S. Ct. 945, 38 L. Ed. 747 (1894) (Pet. 12), this Court held that, where a testator devised a fee to his widow and provided that whatever remained after her remarriage was to go to his children, the widow could convey a fee title during her widowhood, although she later remarried. With these cases we agree, but clearly they have not the slightest bearing on the problem presented here.

This case is governed by *Smith* v. *Bell,* 31 U. S. (6 Pet.) 68, 8 L. Ed. 322 (1832). There the testator bequeathed all his personal estate to his wife, "to and for her own use and benefit and disposal, absolutely; the remainder of said estate, after her decease to be for the use of" his son. This Court, speaking through Chief Justice Marshall, held that the entire language of the will indicated an intent on the part of the testator to provide for his wife for the present and for his son in the future, and accordingly the wife took only a life estate.

To discuss the cases cited by petitioners as authority for their contention that the decision of the Court of Appeals is in conflict with its own decisions (Pet. 24-30) would be to burden this Court unduly. Suffice it to say that the facts in those cases clearly distinguish them from the one here.

Although petitioners contend to the contrary, the holding of the Court of Appeals was in accordance with the great weight of authority. The problem is succinctly discussed in Page on Wills §§985, 986 [1928 Ed.], where the author points out that the great weight of authority in this country allows the creation of a life estate with complete power of consumption, whereas the minority view is that such a power converts the life estate into a fee.[1]

The following authorities amply support the decision below:

Seaward v. *Davis,* 198 N. Y. 415, 91 N. E. 1107 (1910);

Matter of Ithaca Trust Co., 220 N. Y. 437, 116 N. E. 102 (1917);

In re Byrne's Estate, 320 Pa. 513, 181 Atl. 500 (1935);

In re Brennan's Estate, 324 Pa. 410, 188 Atl. 160 (1936).

Since the language of the will taken as a whole indicates that testatrix intended to give her sisters life estates with the power to consume principal, it follows that any limitation thereafter is not void, but must be given full effect in accordance with testatrix's wishes.

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[1] Michigan, Tennessee, Virginia, and West Virginia are the only states which follow the minority rule. Petitioners rely upon the Virginia cases (Pet. 31-33).

Conclusion

It is respectfully submitted that there is no reason whatsoever for this Court to review the determination of the Court of Appeals, which was manifestly correct in all respects; and that, accordingly, the petition herein should be denied, with costs.

Respectfully submitted,

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